

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
WILLIAM E. ARCHAMBEAU,)
Appellant,)
v.)
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)
Respondent.)

PCHB No. 77-114

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This appeal came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, on January 9, 1978 in Spokane, Washington. Hearing examiner William A. Harrison presided. Appellant William E. Archambeau appeals from respondent's denial of his application to move a ground water permit to a new location. Respondent elected a formal hearing pursuant to RCW 43.21B.230. The Spokane court reporting firm of Reiter, Storey and Miller recorded the proceedings. The last post-hearing brief in this matter was received on February 14, 1978.

1 Appellant was represented by his attorney, John Moberg; respondent
2 was represented by Robert E. Mack, Assistant Attorney General.

3 Having heard the testimony, having examined the exhibits, having
4 considered the briefs and arguments, and being fully advised, the Hearings
5 Board makes the following

6 FINDINGS OF FACT

7 I

8 In March, 1969, Department of Ecology's predecessor curtailed
9 further ground water development in the "Quincy Basin, pending the out-
10 core of detailed ground-water investigations to determine if further
11 appropriation of public waters should be allowed."¹ That policy has
12 been carried forward to the present time² with the result that applications
13 to appropriate public ground water have been neither granted nor denied
14 held in abeyance, within what is now known as the Quincy ground water
15 subarea.³ The facts of this appeal arose within the Quincy subarea.

16 In January, 1975, the Department of Ecology (DOE) accepted the
17 declaration of the United States Bureau of Reclamation (Bureau) by which
18 the Bureau was deemed to own ground water which it stored, artificially, in
19 the Quincy subarea.⁴ By mutual agreement, DOE and the Bureau made a por-
20 tion of this artificially stored ground water available for appropriation.

21 1. WAC 173-124-010 and 508-14-010.

22 2. WAC 173-124-030, 173-124-050, and 173-124-060.

23 3. Chapter 173-124 WAC describes the boundaries of this geographic
24 region which is located predominantly in Grant County.

25 4. WAC 173-134-030. Artificially stored ground water is defined
26 at RCW 90.44.035. RCW 90.44.130 provides rules for declaring ownership
of artificially stored ground water.

1 There was provision made for a dual permit system--one to issue from DOE,
2 the other from the Bureau. In March, 1975, DOE granted permits to the
3 first 328 applicants whose applications had been in abeyance following
4 the original curtailment of March, 1969. These DOE permits to withdraw
5 artificially stored ground water in the Quincy subarea are popularly
6 known as "QB permits."

7 II

8 Despite the issuance of these 328 QB permits, many applications for
9 ground water in the Quincy subarea remain in abeyance. A standard
10 condition in each of the 328 QB permits issued states:

11 The permittee shall apply the water to beneficial use hereunder
12 within three years from the date of this permit or the same
shall automatically terminate and be of no further force and
effect.

13
14 In March, 1978, the deadline for developing QB permits according to the
15 above condition, DOE will conduct studies to determine whether there
16 is still enough artificially stored ground water for the 328 QB permits.
17 If so, DOE proposes, in effect, to recover the undeveloped permits and
18 reissue them to applicants for ground water in the Quincy subarea whose
19 applications remain in abeyance and whose priority could be described
20 as "QB 329 and upwards."⁵

21 III

22 QB permit No. 326 was issued to one J. B. Veenendaal who applied
23 for ground water to irrigate his farm land in Grant County. (Site
24

25 5. Appellant, Archambeau, has made application to DOE and that
26 application would entitle him to QB Permit No. 389, should that permit
ever be issued.

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1 indicated on Exhibit R-1.) Veenendaal did not obtain the companion
2 permit from the Bureau to match his DOE permit. Neither did he construct
3 a well nor appropriate ground water. Rather, he agreed to sell the
4 permit to the appellant Archambeau. Archambeau then applied to DOE for
5 permit amendments to change the point of withdrawal and place of use
6 from the Veenendaal property to Archambeau's farm land some two or three
7 miles away. (Site indicated on Exhibit R-1.) The sale of the permit was
8 conditioned upon DOE's approval of the relocation amendments sought by
9 Archambeau. If appellant's application for relocation was granted, with-
10 draws from a well as described in the permit, at the new location, would
11 not impair existing wells. There are pending permit applications in the
12 area of the new location.

13 IV

14 DOE denied the relocation amendment, and among the conclusions in
15 its Order stated:

16 Pending applications for water permits in the area of the
17 proposed new project must be considered prior to the author-
18 ization of changes for unperfected permits.

18 V

19 Any Conclusions of Law which should be deemed a Finding of Fact
20 is hereby adopted as such.

21 From these Findings come the following

22 CONCLUSIONS OF LAW

23 I

24 An application to transfer a QB permit for artificially stored
25 ground water is subject to WAC 173-134-060(2)(f):

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Permits granted herein [QB permits] shall pertain to a specific point of withdrawal and purpose and place of use and shall not be transferrable to other points, purposes or places without written approval of the department [DOE]. (Material in brackets [,] added.)

This regulation contains no express criteria for granting or denying a change of location for a QB permit for artificially stored ground water.

Appellant contends that the above regulation for relocating QB permits is invalid unless the same criteria are used as are used in relocating a public ground water permit. DOE contends, on the contrary, that it may take a completely different attitude in determining whether or not to relocate when considering a QB permit than when considering a permit for public ground water. For the reasons that follow, we need not resolve that issue in this appeal for the result must be the same in either event. The DOE denial of appellant's application to relocate this QB permit must be affirmed.

II

The vital element of this case is that DOE has denied the relocation of a QB permit where that permit has been purchased by a third party (appellant) from an original permittee (Veenendaal) who has constructed no well or other works to appropriate ground water, and where there are pending applications for ground water in the area of the proposed new project. By rendering such a denial, DOE seeks to require that the permit either be developed by the original permittee (Veenendaal) or terminated in March, 1978, according to the terms of the permit and reissued to that person with the earliest application for ground water then pending with DOE. (See Findings of Fact II and IV, supra.)

Assuming, as appellant contends, that the criteria for relocating

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1 QB permits are the same as for public permits, those criteria are found at
2 RCW 90.44.100. We conclude now as we have in the past that this statutory
3 section incorporates and calls for the "findings as prescribed in the
4 case of an original application." By this we are directed to
5 RCW 90.44.060 and in turn, to RCW 90.03.250 through 90.03.340. Within
6 the latter, RCW 90.03.290 prescribes the findings on an original
7 application to be (see Sterpel v. Dep't of Water Resources, 82 Wn.2d 109
8 at 115 (1975)):

- 9 (1) availability of water
- 10 (2) beneficial use
- 11 (3) will appropriation impair existing use
- 12 (4) will the appropriation detrimentally affect the public welfare.

13 In prior appeals involving public ground water permits, we have held that
14 relocating a permit would not be in the public interest where there are
15 pending applications for ground water, and thus is contrary to
16 RCW 90.03.290, above. Sparks v. DOE, PCHB No. 77-43 (1977) and Schuh v.
17 DOE, PCHB No. 77-109 (1977). In Sparks we concluded that such
18 relocations:

19 . . . would, if followed by others, substantially and
20 detrimentally affect and subvert the comprehensive
21 regulatory and management scheme adopted by the DOE for
the Quincy subarea under which pending applications
have not been acted upon since 1969.⁶

22 Assuming that the criteria for relocating a QB permit are the same as for
23

24 6. We also concluded in Sparks, however, that RCW 90.03.380, made
25 applicable by RCW 90.44.020, allows DOE to amend a permit, in a proper
26 case, to authorize a change in the point of diversion even though the
water has not yet been appropriated to a beneficial use.

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1 a public ground water permit, therefore, DOE's denial in the circumstances
2 of this appeal must be affirmed under authority of the above-cited prior
3 decisions of this Hearings Board and the conclusions therein.

4 Assuming, as DOE contends, that the statutory criteria applicable
5 to relocating a public ground water permit do not apply to relocation of a
6 QB permit, we must inquire as to which other statute controls relocation
7 of QB permits and whether DOE's denial in this appeal is consistent with
8 that other statute. DOE did not identify, in this appeal, the enabling
9 legislation under which it promulgated its regulation on relocating QB
10 permits, WAC 173-134-060(2)(f), supra. We take official notice, however,
11 of DOE Administrative Order No. DE 74-35, on file with the Code Reviser,
12 by which the entire chapter 173-134 WAC was promulgated. Paragraph (1)
13 thereof states that chapter 173-134 WAC was adopted under the authority
14 vested by RCW 43.21A.080, RCW 43.27A.090 and chapter 90.44 RCW. Under
15 DOE's contention in this appeal the portions of chapter 173-134 WAC
16 pertaining to public ground water would be authorized by chapter 90.44 RCW,
17 the Public Ground Water Code, but the portions pertaining to QB permits,
18 such as WAC 173-134-060(2)(f), would not. Logically, these latter
19 regulations would be authorized by RCW 43.21A.080 and RCW 43.27A.090.
20 Assuming this to be the case, we find the following language, inter alia,
21 at RCW 43.27A.090:

22 . . .
23 (3) To cooperate with, assist, advise and coordinate plans
24 with the federal government and its officers and agencies,
25 and serve as a state liaison agency with the federal
26 government in matters relating to the use, conservation,
27 preservation, quality, disposal or control of water and
28 activities related thereto.

29 (4) To cooperate with appropriate agencies of the federal
30 government and/or agencies of other states, to enter into

contracts, and to make appropriate contributions to federal or interstate projects and programs and governmental bodies to carry out the provisions of this chapter.

(6) To develop and maintain a coordinated and comprehensive state water and water resources related development plan, and adopt, with regard to such plan, such policies as are necessary to insure that the waters of the state are used, conserved and preserved for the best interest of the state. There shall be included in the state plan a description of developmental objectives and a statement of the recommended means of accomplishing these objectives. To the extent the director deems desirable, the plan shall integrate into the state plan, the plans, programs, reports, research and studies of other state agencies.

(11) To promulgate such rules and regulations as are necessary to carry out the purposes of this chapter.

The QB permit in this appeal pertains to artificially stored ground water owned by the Federal Bureau of Reclamation. Exercising its authority to enter into contracts with the federal government, DOE accepted the Bureau's declaration of ownership in return for the Bureau's promise to make a portion of this artificially stored ground water available for appropriation. Under the same agreement and under DOE's power and duty to cooperate with the federal government in matters relating to the use and control of water, DOE regulates the artificially stored ground water in cooperation with the federal government. (See Finding of Fact I.) By denying appellant's request, DOE insures the integrity of the water management system it has devised for artificially stored ground water in the Quincy subarea. Orderly control and development of such a precious natural resource is "necessary to insure that the waters of the state are used, conserved, and preserved for the best interests of the state." RCW 43.27A.090(6). See WAC 173-136-040; 173-134-060. To allow the instant relocation would be precedent setting.

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1 and if permitted, would substantially and detrimentally affect and
2 subvert the comprehensive regulatory and management scheme adopted for
3 the area. Sparks and Schuh, supra. The "public interest" thus operates
4 to protect the substantial interests of those pending permit applicants
5 in a particular location by preventing a "promiscuous scramble" for
6 ground water permits.⁷ Assuming that RCW 43.27A.090 controls the
7 relocation of QB permits rather than the Public Ground Water Code,
8 chapter 90.44 RCW, DOE's denial in the circumstances of this appeal
9 must be affirmed.

10 II

11 Appellant has not proven that DOE dealt with his application
12 differently from others similarly situated, that is, a sale and
relocation of an undeveloped permit.

14 IV

15 Any Finding of Fact which should be deemed a Conclusion of Law
16 is hereby adopted as such.

17 From these Conclusions the Pollution Control Hearings Board
18 enters this

19 ORDER

20 The Department of Ecology's order denying appellant's application
21

22 7. DOE contends that no QB permit may be considered for relocation
23 unless perfected by an actual appropriation of ground water to a beneficial
24 use. DOE's own regulation on relocating QB permits, WAC 173-134-060(2) (f)
25 quoted in Conclusion of Law I, is to the contrary. That regulation
26 encompasses "permits granted" and is not limited to "perfected permits
27 granted."

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1 to amend Ground Water Permit QB 326 is hereby affirmed.

2 DONE at Lacey, Washington this 20th day of March, 1978.

3 POLLUTION CONTROL HEARINGS BOARD

4 
5 DAVE J. MOONEY, Chairman

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7 CHRIS SMITH, Member

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